



NO. 82-961

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA, EX REL.,
AURORA COUNTY, ET AL.,

Petitioner,

v.

RICHARD B. OLGILVIE AS TRUSTEE
OF THE CHICAGO, MILWAUKEE,
ST. PAUL AND PACIFIC
RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL APPENDIX

MARK V. MEIERHENRY
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Counsel for Petitioner

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas R. McMiller
Cause No. 77 B 8999 Date DEC. 5, 1979
Title of Cause In the Matter CHICAGO, MILWAUKEE,
ST. PAUL & PACIFIC R. CO.
Brief State-
ment of Motion _____

The rules of this court require counsel to
furnish the names of all parties entitled
to notice of the entry of an order and the
names and addresses of their attorneys.
Please do this immediately below (separate
lists may be appended).

Names and
Addresses of
moving counsel

Representing

Names and
Addresses of
other counsel
entitled to
notice and
names of par-
ties they
represent.

Enter order No. 26B:

Reserve space below for notations by minute clerk

Trustee's motion for summary judgment on the
complaint filed by the State of South Dakota
on behalf of its political subdivisions, &
Trustee's motion for summary judgment on his
counterclaim is granted. The Trustee is order-
ed to serve & file proposed judgment order
within 10 days to which plaintiff may file
objections within 10 days thereafter. (De-
cision attached)

Hand this memorandum to the Clerk.
Counsel will not rise to address the
Court until motion has been called.

Unr. Dec.-21

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

In the Matter of)	In Proceedings for the
)	Reorganization of a
CHICAGO, MILWAUKEE)	Railroad
ST. PAUL AND PACIFIC)	
RAILROAD CO.,)	
)	
Debtor.)	
)	
STATE OF SOUTH)	
DAKOTA, etc.,)	
)	
Plaintiff,)	
)	
STANLEY E. G.)	
HILLMAN, Trustee, etc.)	NO. 77 B 8999
)	
Defendant.)	

D E C I S I O N

Plaintiff has filed a complaint in this proceeding seeking relief from this court's Order No. 1, paragraph 10. We find and conclude that defendant is entitled to summary judgment on the complaint, and on his counterclaim.

The Trustee is indebted to various South Dakota counties for taxes due for 1977 and 1978

on the debtor's operating property within that state. The Trustee has admitted tax liabilities in specified amounts. However, the Trustee's counterclaim alleges that 29 of the plaintiff's counties are indebted to him for tax refunds pertaining to the years 1969 and 1970. Plaintiff has admitted the liability for the tax refunds, but has denied the specific amounts due.

Paragraph 4B of this court's Order No. 1 authorizes the Trustee, in his discretion, to pay taxes due upon the debtor's properties. Paragraph 10 of that order prohibits the set-off of any obligation to the debtor against any obligation owed by the debtor. Plaintiff alleges that the Trustee has abused his discretion in failing to pay these property taxes, the plaintiff seeks relief from paragraph 10 of Order No. 1 so that it may set-off the claims for property taxes against the tax refunds due the Trustee.

The affidavits submitted with the Trustee's motion for summary judgment demonstrate that the

Trustee has not abused his discretion in deferring payment of these property tax liabilities. The affidavit of Richard Nugent states that the Trustee has deferred paying more than \$13,000,000 in local taxes since the filing of the reorganization petition. This is well within the Trustee's discretion exercised to meet the debtor's continual operating needs for cash.

We must also deny plaintiff's request for relief from paragraph 10, Order No. 1. This court has twice followed the rule of Baker v. Gold Seal Liquors, 417 U.S. 467 (1974), in this proceeding. (Orders No. 191, 196.) To accord plaintiff a modification of Order No. 1 for the benefit of the political subdivisions would effectively vacate paragraph 10 of the order and would impede the Trustee in collecting many of his claims. Allowance of a set-off, in effect, grants a preference to that creditor over others, and this we have consistently declined to do.

The affidavit of Richard Nugent sets forth the amounts due from plaintiff's subdivisions for overpayments made by the debtor in 1969 and 1970. Plaintiff has not contested the accuracy of those amounts in the manner required by F.R.C.P. 56, nor has it filed any response to the Trustee's motion for summary judgment, filed October 5, 1979.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee's motion for summary judgment on the complaint filed by the State of South Dakota on behalf of its political subdivisions, and the Trustee's motion for summary judgment on his counterclaim against those political subdivisions, is granted. The Trustee shall serve and file a proposed judgment order within ten (10) days to which plaintiff may file objections within ten (10) days thereafter.

ENTER:

JUDGE, U.S. DISTRICT COURT

DATED: Dec. 5, 1979

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas R. McMillen

Cause No. 77 B 8999 Date JAN. 11, 1980

Title of Cause In the Matter CHICAGO, MILWAUKEE,
ST. PAUL & PACIFIC R. CO.

Brief State-
ment of Motion

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Names and
Addresses of
moving counsel

Representing

Names and
Addresses of
other counsel
entitled to
notice and
names of parties they
represent.

Reserve space below for notations by
minute clerk

Motion of the State of South Dakota,
on behalf of its political subdivisions,
to reconsider this court's Order No.
263 is denied. Baker v. Gold Seal
Liquors, 417 U.S. 467 (1974) is not
limited to unsecured claims (e.g. p.
473). Also, continual need for operat-
ing cash pending reorganization justifies
this treatment of plaintiff's claims.

ENTER:

/s/ Thomas R. McMillen
JUDGE, U.S. District Court

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until
motion has been called.